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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 77-439

HAROLD EKMANIAN, individually and B & H INGLEWOOD TOW, a corporation,

Petitioners,

vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term 1978
No._____

HAROLD EKMANIAN, individually and B & H INGLEWOOD TOW, a corporation,

Petitioners,

vs.

F. RAY MARSHALL, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Harold Ekmanian, individually, and B and H Inglewood Tow, a corporation, respectfully petition for the issuance of a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed in this matter on July 27, 1977.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit - which it directed not to be published - is set forth in Appendix "A" to this petition.

The Memorandum decision of the United States District Court for the Central District of California, filed October 20, 1975, is set out in Appendix "B" to this petition.

JURISDICTION

Jurisdiction of this court is invoked seeking a review of the decision of the Court of Appeals for the Ninth Circuit under and pursuant to the provisions of 28 U.S.C. 1254(1).

The decision of the Court of Appeals, as set out above, was filed on July 27, 1977 and this petition for a writ of certiorari is filed within 90 days thereafter.

QUESTIONS PRESENTED

I. PRIME QUESTIONS

1. IS NOT THE RULE AND CRITERIA ADOPTED BY THE NINTH CIRCUIT IN REGARD TO BEING "IN COMMERCE"[1/] UNDER THE FAIR LABOR STANDARDS ACT, THAT IT IS THE WORK OF THE "EMPLOYER" THAT DETERMINES COVERAGE, AND THAT ACTIVITIES WHICH MERELY "AFFECT" COMMERCE, PLACES ONE "IN COMMERCE" UNDER THE ACT, COMPLETELY CONTRARY TO THE LAW AS ADOPTED BY THE CONGRESS AND TO THE DECISIONS OF THIS COURT (AND THOSE OF OTHER CIRCUITS)?

2. IS NOT THE EFFECT OF THE DECISION AND RULE ADOPTED BY THE NINTH CIRCUIT, THAT EMPLOYEES OF A SMALL LOCAL SERVICE GARAGE IN INGLEWOOD, CALIFORNIA (within the greater Los Angeles Metropolitan area) WHO NEITHER SERVICE NOR MAINTAIN ANY INSTRUMENTALITY OF COMMERCE, NOR ENGAGE IN ANY ACTIVITY RELATING TO OUT-OF-STATE TRANSACTIONS, ARE ENGAGED IN

1/ "'Commerce' means trade, commerce, transportation, transmission or communication among the several States or between any State and any place outside thereof." 3(b) Fair Labor Standards Act, 29 U.S.C. 203(b).

"COMMERCE" (In essence because the employer is a part of an industry that the court says the Congress intended the Act to cover, and that thus each and every member of the industry are covered -- this being contrary to the Act and the decisions of this Court) SUCH AS TO DEPRIVE THE PETITIONERS HEREIN THE PROTECTION OF THE ACT AS ADOPTED BY THE CONGRESS AND THE BENEFIT OF THE DECISIONS OF THIS COURT?

II. COLLATERAL QUESTIONS

3. DOES THE INTERPRETATION GIVEN THE "COMMERCE" PROVISIONS OF THE FAIR LABOR STANDARDS ACT BY THE NINTH CIRCUIT HEREIN VIOLATE THE TENTH AMENDMENT OF THE U.S. CONSTITUTION?

4. MAY THE LABOR DEPARTMENT UTILIZE A SELF-CREATED FICTITIOUS WAGE RATE IN CREATING LIABILITY FOR CLAIMED UNPAID OVERTIME WAGES AGAINST AN EMPLOYER, THE ACTUAL EMPLOYEE WORK RECORDS, (THE ACCURACY OF WHICH ARE NOT QUESTIONED) SHOWING THAT THE EMPLOYEES HAVE BEEN OVERPAID?

5. CAN STATUTORY MANDATED WITHHOLDING AND SOCIAL SECURITY DEDUCTIONS ETC. BE IGNORED BY THE COURT IN ASSESSING CLAIMED UNPAID OVERTIME WAGES?

STATUTORY PROVISIONS INVOLVED

1. Section 3(b) of the Fair Labor Standards Act, 29 U.S.C. 203(b):

"(b) 'Commerce' means trade, commerce, transportation, transmission or communication among the several States or between any State and any place outside thereof."

2. Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 207(a)(1):

"§ 207 Maximum hours

"(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce..... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specificed at a rate not less than one and one-half times the regular rate at which he is employed."

3. Section 7(e)(5)(6)(7) of the Fair Labor Standards Act, 29 U.S.C. 207(e)(5)(6)(7):

"(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

* * *

"(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are

hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

"(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one half times the rate established in good faith for like work performed in nonovertime hours on other days; or

"(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic normal or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section where such premium rate is not less than one and one half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek."

4. Section 7(h) of the Fair Labor Standards Act, 29 U.S.C. 207(h):

"(h) Extra compensation paid as described in paragraphs (5) - (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

5. Section 3402(a) of Title 26 U.S.C.:

"(a) Requirement of Withholding - Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. **"

6. Section 3101(a), 3102(a)(b) of Title 26 U.S.C.:

Section 3101

"(a) Old-age, survivors and disability insurance. - In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of wages (as defined in Section 3121(a) received by him with respect to employment . . . . ."

Section 3102

"(a) Requirement. - The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. ** (underscoring added)

"(b) Indemnification of employer. - Every employer required so to deduct the tax shall

be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer. (Underscoring added.)

STATEMENT OF THE CASE

A. RELEVANT FACTS

B & H INGLEWWOD TOW, a California corporation, (whose stock was owned by petitioner, HAROLD EKMANIAN), located in Inglewood, California, engaged in the sole business of offering and providing in the Inglewood area of Los Angeles County, California (some 200 miles from another State) automotive roadside service, to motorists in the area including providing gas, battery charge, fixing flats, starting stalled cars and towing, if required, to any requested garages in the area for repair (pre-trial admissions, Clerk's Transcript page 162, lines 6 through 11).

One of the internal routes for local traffic in the Inglewood area was a portion of a highway called the San Diego Freeway, the traffic on which was prominently local (Reporter's Transcript, page 146, lines 6 through line 20 of page 148).

The only servicing rendered on this highway was for local Auto Club members, primarily by a service truck or a pickup truck, rather than a

tow truck, and all of such services were confined predominantly to vehicles off the travelled roadway (on the shoulder and parking area), the services being primarily to provide gas, fix tires, start cars, battery jumping and the like (Reporter's Transcript, page 147, lines 24 through line 23 of page 148 - Clerk's Transcript, page 162, lines 12 through 22).

Neither petitioner nor their employees transported any vehicles or materials in or out of the State of California or between California and any place outside thereof.

They serviced no instrumentality of commerce.

Petitioner was in competition with other local service garages in the area.

Petitioner was not designated by the California Highway Patrol or the Department of Transportation to service any freeway. Such designation was given to another garage, the INGLEWOOD SERVICE GARAGE, which handled all of the tow work or wreck stoppage on such freeway (Reporter's Transcript, page 146, lines 5 through 22).

The Los Angeles Metrolpolitan area has no subways, rapid transit or urban public transportation system except buses which utilize, as do the private automobiles, these local freeways as their sole means of fast transit from one local point to the other. The Los Angeles Metrolpolitan area is unique in that the basic internal routes of local

travel to and from work and to and from court, even for shopping and all local activities are on routes which have been designated as freeways. (Exhibit "C", Exhibit "D", and Exhibit "E", introduced in evidence.)

Prior to 1972, the drivers employed by petitioners were paid on a salary. In 1972, they were changed to an hourly rate for the 40 hours per week and time and one-half for all hours over 40 (Reporter's Transcript, page 150, lines 20 through line 15 of page 151).

The employment records of petitioners consisted of the individual employee's time cards (on which the employees themselves filled in the time they worked), a rate card showing the hourly rate used for the first 40 hours on which time and one-half in excess of 40 hours was computed; check vouchers for checks issued to each man; quarterly tax returns, and commission slips filled in by each employee after doing a tour of standby work, listing his commission calls ((Reporter's Transcript, page 179, lines 19-23, page 123, lines 20 through line 8 of page 129, lines 15-18, page 133, lines 4-9).

In addition to the normal work or regular working hours, the employees (on a voluntary basis, with shifts selected by themselves) were afforded standby work for which they were paid a premium rate of $2.00 on Auto Club calls, a minimum of $5.00 for a police call and 50% commission on any commercial work brought in. Auto Club calls required from 15 to 30 minutes, police calls from 30 to 45 minutes, commercial

calls from 30 minutes to 1 hour (Reporter's Transcript, page 51, lines 8-20; page 21, lines 3-19; page 51, lines 1-12; page 61, line 14 through line 8 of page 63; page 163, line 3 through line 24 of page 165).

The men were paid on a bi-weekly basis.

When the representative from the Labor Department first came to check the records of petitioners, he did not check the individual time cards or commission sheets, but merely examined the check vouchers and the quarterly tax returns.

After he advised petitioners that he wished the records to be kept in a different form, petitioners hired an outside accountant to put the records in such form, that is, to go through all of the records, time cards, commission sheets, vouchers and master rate sheet, etc., and make them conform to the record keeping method the Labor Department required (Reporter's Transcript, page 111, lines 1-5; page 119, line 24 through line 4 of page 120; page 122, lines 6-12; page 125, lines 10-17).

The records so prepared by the accountant from the actual time cards, vouchers, commission sheets and time slips filled in by the employees themselves, accurately reflected their regular time, overtime and premium rate of pay for standby and commission calls after regular hours. This was admitted into evidence as Exhibit 40) (Reporter's Transcript, page 123, line 11 through line 17 of page 125).

The employees testified that these records accurately reflected their time and pay.

When such premium pay was applied to overtime, as required under §7(h) of the Fair Labor Standards Act, there was a total overage of payment of $5,974.00 above that required by the Act (Reporter's Transcript, page 167, line 10 through line 24 of page 169).

No evidence was presented that any employee serviced any motorist engaged in travel other than within the local area of Inglewood.

The Labor Department investigator, in checking petitioners' company to determine whether they were engaged in commerce, took into account only the gross amount of sales done by the employer and the fact that they serviced some motorists on the local freeway in Inglewood (Reporter's Transcript, page 98, line 8 through line 21 of page 99).

He did not check the individual time cards for the employee, nor their commission sheets, nor compute any regular rate; but arbitrarily using a 54 hour week (some of the men did not work 54 hours)took the total compensation from all sources, including premium pay for work after hours and divided it by 54 to come up with a fictitious rate and computed time and one-half of this rate for overtime claimed due (Reporter's Transcript, page 99, line 22 through line 17 of page 103).

Based upon the case of Gray v. Swanney-McDonald, Inc., 436 F.2d 652 (1971), the Court ruled that each and every employee of the petitioners were engaged in interstate commerce (Clerk's Transcript, page 308, lines 20-22), rejected the regular rate and data as shown on the original employee records which they testified were correct, accepted the created rate and hours presented by the Labor Department, rejected the application or credit for premium pay on standby under Section 7(e)(5)(6) and (7) of the Act (Clerk's Transcript, page 238) and rendered judgment against petitioners (Clerk's Transcript, page 315 and page 316).

On review, the Court of Appeal, without permitting oral argument, determined, based on the case of Gray v. Swanney-McDonald, Inc., 436 F.2d 652 and cases based thereon, that petitioners were engaged in commerce but that the trial Court erred in including the overtime premium pay for standby work in computing the regular rate and affirmed in part and reversed in part the judgment of the trial Court. See Appendix "A".

[Petitioners in their brief suggested a hearing in banc pursuant to Rule 35b of the Federal Rules of Appellate Procedure for the purpose of considering overruling the decision of the Ninth Circuit Court in Gray v. Swanney-McDonald, Inc., 436 F.2d 652 (1971) (as such decision and those that followed it were contrary to the Fair Labor Standards Act and contrary to recent decisions of the Supreme Court) but no consideration apparently was given to such suggestion.

B. PROCEEDINGS HAD

The Secretary of Labor brought this action under §17 of the Fair Labor Standards Act (29 U.S.C. 217) to restrain the withholding of payment of claimed overtime compensation, seeking an injunction, and alleged that petitioners had not maintained and kept their business records in the precise fashion desired and required under the regulations prescribed by the Labor Department (Clerk's Transcript, pages 1 through 4).

By answer petitioners denied the material allegations of the Complaint, asserted that it did not state a claim upon which relief could be granted, that none of the employees were engaged in interstate commerce, but that their activities were purely local and beyond the power of Congress, as proscribed by the Tenth Amendment to the United States Constitution, and in excess of jurisdiction to attempt to regulate the same; that assuming arguendo, any activities of any employees were involved in commerce this was not specified in the Complaint; that assuming arguendo, that any of the employees were engaged in commerce there was no violation by reason of the fact that the extra compensation paid, which was required to be excluded under §7(h) of the Act, pursuant to §7(e)(5), (6) and (7), more than offset any claim; and that the action was barred by other provisions of the Act (Clerk's transcript, page 5 through page 12).

The case was tried without a jury; the Memorandum of Decision was issued, thereafter judgment was rendered and, following the denial

of a motion for a new trial and to amend or alter the judgment, an appeal was taken (Clerk's Transcript pages 239, 298, 315, 319, 334, 343, and 344) 344).

The Court of Appeal rendered its decision without a hearing, as indicated above (Appendix "A") and within the time provided by law, petitioners have filed this Petition for Writ of Certiorari to request a review.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. The Rule and Criteria Adopted by the Ninth Circuit in Regard to Being in "Commerce" Under the Fair Labor Standards Act, That it is the Work of the "Employer That Determines Coverage" and That Activities That Merely "Affect" Commerce, Places an Employee in Commerce Under the Act, Is Contrary to the Act, the Intent of Congress and Decisions of This Court.

"Commerce means trade, commerce, transportation, transmission, or communication among the several states

or between any state and any place outside thereof." §3(b) of the Fair Labor Standards Act, 29 U.S.C. 203(b).

The Act provides that it is the work of the "employee" not that of the employer which determine coverage. The Ninth Circuit apparently has a different rule.

The specific language in the Act itself refers to "employees" who are "engaged in commerce." §6(a) and §7(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a), 207(a).

The Act as it was originally passed by the House of Representatives applied (as the Ninth Circuit now applies the Act) to employers "engaged in commerce in any industry affecting commerce." See H. Rep. No. 2182, 75th Congress, Third Session, page 2; 83 Cong. Rec. 7749-50.

The bill recommended by the Conference and which is on the books today deleted the criteria which is used by the Ninth Circuit as to "employers engaged in commerce in any industry affecting commerce," H. Rep. No. 2738, 75th Congress, Third Session, page 29-30; 83 Cong. Rec. 9158, 9266-67; §6(a) and §7(a), Fair Labor Standards Act, supra.

This Court has stated "the applicability of the Act is dependent on the character of the employees' work."

Walling v. Jacksonville Paper Co.,
317 U.S. 564, p. 571, 63 Sup.Ct. 332, p. 337.

Kirschbaum Co. v. Walling,
316 U.S. 517, 62 Sup.Ct. 1116.

"The test under the present Act to determine whether an employee is engaged in commerce is not whether the employee's activity affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of commerce as to be a part of it."
McLeod v. Threlkeld, 319 U.S. 491, at 497, 319 U.S. 1248, at page 1251.

The intent of the Act is that activities which merely "affect" commerce are not covered. The Ninth Circuit view is different. It is at odds with the decisions of other circuits.

Senate Bill 2475 was introduced and as it passed the Senate was limited to employees engaged in interstate commerce (or in the production of goods for interstate commerce). The House, by amendment, broadened the coverage of the Bill by requiring time and one half overtime for all employees of an "employer engaged in commerce in an industry affecting commerce."
75th Cong., Third Sess., H. Rep. 2182.

The conference draft of the Bill, which was finally enacted into law after the Senate had refused to accede to the House amendment, restored the test of coverage contained in the original Senate Bill, by applying the Act to "employees . . . engaged in commerce ..."

Senator Pepper of Florida, a member of the Conference Committee which drafted the Act as adopted, made its limited scope very clear in discussing the terms of §7 before the Senate.

In answer to an objection to the broad scope of the Act, he said:

> "I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce and the contrary theory was definitely rejected by the Committee." 83 C.R. 9168 (Senate - 75th Cong., Third Sess., June 14, 1938).

This Court stated in Walling v. Jackson Paper Co., supra, 317 U.S., at page 570:

> "In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states."...
>
> "Congress did not exercise in this Act the full scope of the commerce power."

Matters and activities which merely affect commerce are not within the coverage of the Act. McLeod v. Threlkeld, supra.

The Act manifests the competing concern of Congress to avoid undue displacement of state regulations of activities of a dominantly local character.

> Mitchell v. H.B. Zachary Co., AN 362 U.S. 310, p. 316, 80 Sup.Ct. 739, at p. 743.

The activities of the employees of petitioners herein in no manner related to or were involved in interstate commerce. However the District Court was bound by the decisions of the Ninth Circuit. The decisions of the Ninth Circuit, starting with Gray v. Swanney-McDonald, Inc., 436 F.2d 652 (1971), held that the employer, by occasionally rendering service to local vehicles on internal local roadways, which have been characterized as U.S. highways, had become a part of an industry which had a cumulative effect upon interstate commerce and, thus, every member of that industry was covered. [436 F.2d 652, p. 653.]

Here it is conceded, and even the findings of the Court state, that substantially all the service that was rendered on this local roadway some 200 miles from a state line was to vehicles which were pulled off of the traveled portion, service being to provide gas, fix flat tires, etc. In fact, the evidence showed that substantially all of such service was done by pickup truck and, thus, there is no unblockage work in relation to interstate highways.

The characterization of a local internal route utilized by local residents to go to and from work, as an interstate highway and thereby to

throw a blanket of Federal regulations on these local employees, is contrary to the intent and purpose of the Act and amounts to an overreaching into areas and fields which Congress never intended the Labor Department to tread.

It should be pointed out in the beginning that basically the thrust of the Labor Department in these cases is not betterment of employees but it seems to be regulation, for the sake of regulation alone, and to subject employers of small local businesses to abstract highly impractical book-keeping systems and payment plans which usually result in reduction of wages to the employees involved.

The Ninth Circuit Court of Appeal took the identical view which it has taken in regard Fair Labor Standard Act cases as to being in commerce under Robinson-Patman and Clayton Acts which have almost an identical definition of commerce as in Fair Labor Standards Act. This Court granted certiorari and corrected this concept in the case of Gulf Oil Corporation v. Copp Paving Co., Inc., 419 U.S. 186, 95 S.Ct. 392 (December 1974).

In such decision this Court pointed out, under an almost identical definition of commerce and an almost identical legislative history as in the Fair Labor Standards Act that matters which merely "affect" commerce are not "within the flow of interstate commerce" and are not covered.

In the present case there has been not one iota of evidence of any act of any employee in any manner even "affected" commerce.

II. The Decision Is At Odds With Decisions of Courts In Other Circuits.

As indicated, the rule in the Ninth Circuit starting with the case of Gray v. Swanney-McDonald, Inc., 436 F.2d 652 (1971), followed by Brennan v. Keyser, 507 F.2d 472 (1974) in essence holds that it is not the act of the employee which is determinative of coverage but that of the employer and that the composit effect of service upon any road which is designated as an interstate highway or leads to an interstate highway however local the same may be, has some effect upon interstate commerce and "affects" it, and, therefore, all employees of any employer in such an industry are covered.

As pointed out above, this is contrary both to the Act and to the decisions of this Court.

Other circuits have ruled (contrary to the Ninth Circuit) in accordance with the rule laid down by the Supreme Court, that it is the act of the employee, not that of the employer, which determines coverage and that local matters and local activities are not covered by the Fair Labor Standards Act.

See Wertz v. Modern Trashmoval, (4th Cir.) 323 F.2d 455, certiorari denied, 377 U.S. 925, 84 S.Ct. 1222.

Wertz v. R. E. Lee Electric (4th Cir.) 339 F.2d 686 (installing air conditioning in government buildings).

Mitchell v. Household Finance (3rd Cir.) 208 F.2d 667 (local employees of a national interstate loan company not engaged in commerce).

Johnson v. Cotton Producers Association (5th Cir.) 244 F.2d 553 (local employees of a cooperative store not engaged in commerce).

Jax Beer Co. v. Redfern (5th Cir.) 124 F. 2d 172 (local drivers delivering beer imported from out-of-state not engaged in commerce).

Phillips v. Graham Aviation Co. (5th Cir.) 157 F.2d 443 (guards and watchmen at an airport not engaged in commerce).

Lofther v. First National Bank of Chicago (7th Cir.) 138 F.2d 299 (watchmen and elevator operators and janitors employed by National Bank not in commerce).

Jewel Tea Company v. Williams, 118 F.2d 202 (10th Cir.) (Act does not extend to employment which merely affects commerce-outside salesmen for tea company.

Johnson v. Dulles Downtown Development Co. (5th Cir.) 132 F.2d 287, 289 (local employees not engaged in commerce).

Karrigan v. Provident Trust Co., etc., 153 F.2d 74, (3rd Cir.) (night guard and janitor of bank not engaged in commerce).

Rucker v. First National Bank of Miami, Oklahoma (10th Cir.) 138 F.2d 699 (elevator operator in bank building not engaged in commerce).

Schultz v. National Electric (10th Cir.) 414 F.2d 1225 (warehouse workers not engaged in commerce).

III. Petitioners and Those in the Ninth Circuit Are Denied the Benefits of the Act as Enacted by Congress and the Interpretation Given by This Court.

It matters not what the Congress of the United States may declare its intent to be nor what the Supreme Court of the United States may lay down as an interpretation of the Fair Labor Standards Act, for petitioners herein and all those in the Ninth Circuit, it is the ruling of the Ninth Circuit Court of Appeals that controls.

Only in those instances - as in Gulf Oil Corporation v. Copp Paving, supra, where this Court reversed the same interpretation given by the Ninth Circuit (as anything "affecting" commerce

is in commerce) as it is made here, can any relief be afforded to persons who are subjected to a ruling which is contrary to the Act and to the decisions of this Court.

In essence then, petitioners herein respectfully submit that they have been deprived of the protection of the Fair Labor Standards Act as written by the Congress and as intended by the Congress to apply and they have also been deprived of the interpretation of the Act as made by this Court because the Ninth Circuit Court of Appeal does not follow the same.

IV. The Effect of the Decision of the Ninth Circuit Is To Extend the Act Beyond the Power of the Federal Government To So Act in Violation of the Tenth Amendment.

While Congress has been endowed with authority to regulate interstate commerce, the states have reserved to themselves control of local matters. In what may be characterized as a form of judicial legislation, the Court of Appeal has encroached upon the reservation of powers to control local matters reserved by the states and has extended federal bureaucracy into areas never intended by the Congress nor authorized by the Constitution. It is respectfully submitted that this does violate the Tenth Amendment and that Petitioners have been injured thereby.

V. Can the Court Ignore the Mandate of Tax Statutes Requiring Withholding?

The judgment rendered in this case, although this point was made in the trial court and also in the Court of Appeal, no provision was made in awarding alleged unpaid overtime wages for the mandatory deduction of withholding taxes, Social Security taxes or State Unemployment or State income taxes.

Section 3402(a) of Title 26 of U.S.C. makes it mandatory upon every employer to deduct and withhold income tax from the employees' wages.

Section 3102 of Title 26 of the United States Code, also makes it mandatory that the employer collect Social Security deductions from the wages of the employees.

Both Courts below have ignored this and the judgment rendered in this case does not make any provision for the mandatory deductions required (both State and Federal) by the employer. Apparently there has been no decision on this point.

CONCLUSION

For the reasons and grounds set forth, it is respectfully urged that this Court issue a Writ of Certiorari to review the judgment and the decision of the Court of Appeals herein. One rule regarding "in commerce" should prevail throughout the land. Those in the Ninth Circuit should have the benefit of the Act and decisions of this Court. To permit the Ninth Circuit to impose a rule on persons under its jurisdiction which was rejected by the Congress, is to deny to petitioners herein and all persons in the Ninth Circuit, the benefits of the law as enacted by the Congress and the decisions of this Court as to what is "in commerce" under the Fair Labor Standards Act.

Respectfully submitted

G. G. BAUMEN

Attorney for Petitioners

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, *Appellee*,

vs.

HAROLD EKMANIAN, individually and B & H INGLEWOOD TOW, a corporation, *Appellants*.

No. 76-1693

MEMORANDUM

[July 27, 1977]

Appeal from the United States District Court for the Central District of California

Before: ELY, HUFSTEDLER, and ANDERSON, Circuit Judges.

B & H Inglewood Tow ("B & H") appeals from a judgment in an action brought by the Department of Labor for violations of the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 207, 211. We affirm in part and reverse and remand in part.

At the outset B & H questions whether its employees are "engaged in commerce" as required by 29 U.S.C. § 207(a)(1). B & H is engaged in the automotive roadside service business. Since its employees service disabled cars on interstate as well as local roads, B & H is clearly covered by the Act. *See Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652 (9th Cir. 1971). The dispositive factor is not, as B & H contends, the destination of the motorists it services, but rather, whether the roads upon which the services are located are instrumentalities of interstate commerce. *Brennan v. Keyser*, 507 F.2d 472, 474-5 (9th Cir.

1974). Therefore, we affirm the district court's conclusion that B & H is covered by the Act.

B & H also questions the district court's finding both that it failed to properly compensate its employees for overtime work and that the method the Department of Labor utilized to calculate the exact amount of overtime wages due was correct. Since all but one of B & H's employees who testified stated they were hired at a specified salary for a six-day, sixty-hour week with no provision for overtime at time and one-half their regular rate of pay, the district court correctly determined B & H's liability. *See Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 106 (9th Cir. 1975). However, the district court did not correctly determine the amount of B & H's liability. Since it determined that the wages paid for standby service already included an overtime premium, it should have deducted those wages from the total wages before computing the regular hourly rate in accordance with 29 U.S.C. § 207(e), (h). *Brennan v. Valley Towing Co., Inc., supra* at 110. Therefore, we must remand the case for a redetermination of the amount due. Considering the state of B & H's records, the district court upon remand will have to estimate the amounts paid for standby service unless the parties can proceed by stipulation. *Brennan v. Valley Towing Co., Inc., supra* at 112.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 8-3-77—410

APPENDIX B

Filed
Oct 20 1975
Clerk, U.S. District Court
Central District of
California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN T. DUNLOP, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	No. CV 74-3535-DWW
Plaintiff,	MEMORANDUM
vs.	
HAROLD EAKMANIAN, individually, and B & H INGLEWWOD TOW, a corporation,	
Defendants.	

Plaintiff, a United States agency, brings this action to enjoin defendants from violating provisions of the Fair Labor Standards Act of 1938 as amended (29 USC §201 et seq.) and to cause payment of unpaid overtime compensation which may be found to be due defendant's employees and to cause defendant to cease the

keeping of irregular and incomplete records of the hours and rates of pay respecting employees.

Defendant if a tow truck company engaged in providing assistance to and towing of disabled vehicles from freeways, highways, streets and roads in the Inglewood area. The employees are tow truck drivers employed by defendant.

The portion of the complaint that pertains to irregular records is from January, 1972 through December, 1973. The only portion for which recovery is sought of unpaid overtime compensation is from December, 1972 through December, 1973.

Defendant at the outset claims that it is not covered by the Fair Labor Standards Act because it is a company which operates entirely local in character and scope and that none of its employees have been or are engaged in interstate commerce as defined in the Act. The basis of this "coverage" argument is that most of the defendants work involves furnishing gasoline or repairing tires or jump-starting cars on city streets and only occasionally on a nearby freeway. Defendant claims that the only time its drivers go on a freeway is pursuant to an Auto Club call that will call for the providing of the above described services and that at such times the cars are either on the far right shoulder or on the far left median. Defendant contends that it has no contract with the Police Department or CHP whereby it would get police calls to tow wrecked cars from blocking traveled lanes and that because of this limitation in its scope of services it cannot be said to be engaged in interstate commerce or in a

task which unblocks the traffic lanes which would serve interstate travel. Eakmanian testified that another rival company (Inglewood Service Garage) holds the CHP contract in the Inglewood area to remove freeway wreckage; that this is a lucrative contract because it carries the responsibility of not only removing wreckage but also sweeping the freeway clean of every bit of wreckage debris; that he only holds an Auto Club contract that pays him $3.20 per call whether on the freeway or not.

Plaintiff produced several past and present drivers employed by defendant who testified that they answered freeway calls sometimes daily and sometimes four or five times a week but none of these testified that they did anything more than furnish gas, fix tires or start stalled cars. Occasionally they are called upon to tow disabled, but not wrecked vehicles from the shoulder. These drivers testified that when they were hired they were not told that they would be paid an hourly rate. They were advised they would receive $125 per week for a 10 hour day, six days per week, or 60 hours, with one hour off for lunch, making 54 hours. In some instances the salary was later raised to $150 or $175 per week. The drivers testified that they rarely got to take a full hour for lunch and reequently took only from 20 to 30 minutes because they were so busy and that on occasions they would merely eat a sandwich while responding to another call via radio so that in effect they worked $9\frac{1}{2}$ hours per day.

Most of the drivers testified that they volunteered from one to three nights per week to

serve on a standby basis which means that they must on that night remain at home or near a designated telephone so they could be called to respond to a call if the need arose. This amounted to extra work which they were not compelled to do but seemed desirous of doing because of the extra money. On these standby calls the driver would get $2.00 of the $3.20 if it was an Auto Club call; $5.00 if it was a police call and even a larger amount if the call was for a private party and the trouble took more than 30 minutes to correct. The drivers would keep a record of the number of standby calls they made and the time it took and each pay period they would have their division of the money added to their regular compensation. The check usually showed how much was for regular compensation and how much was for standby.

The evidence indicates that prior to the time plaintiff's compliance officer visited Eakmanian to inspect his books, Eakmanian kept sloppy records and depended upon his drivers to jot down on cards the number of hours they worked for regular compensation. Sometimes the drivers would not make any record until after several days had passed and then would attempt to go back and reconstruct hours they had spent days earlier.

When the investigation began, Eakmanian installed a time clock and instructed his drivers to punch in and out each day, and the records from that point on were somewhat improved. Eakmanian had an outside accountant who would go over the various cards and vouchers at the end of each month and attempt to make some sort of

record and from this would prepare tax statements. The entire operation showed grossly inadequate accounting and bookkeeping and reflects no effort to establish an hourly rate for the first 40 hours per week and time and a half for hours over 40. At least the relief sought by plaintiff ought to be granted to the extent of requiring defendant to set hourly rates and pay time and a half for over 40 hours per week and to maintain his records in such manner as will assist plaintiff to future audits.

Defendant claims that the pay actually given his drivers each pay period ($125 to $175 per week plus added compensation for standby work when performed) actually paid each driver an amount roughly equivalent to or in excess of the amount that driver would get if he had been paid a designated hourly rate within the Act for the first 40 hours plus time and a half for anything over 40 hours. By this argument the defendant would integrate the time a driver spends on standby calls into overtime by allocating 30 minutes to each standby call and paying time and one half for that call. It may be that the bookkeeping will show that some drivers actually got the full amount they should get under the Act by using defendant's formula but this would be accidental and not because of an effort on the part of defendant to comply with the Act.

I conclude that defendants are covered by the Fair Labor Standards Act as amended; that defendants have failed to keep adequate records of their employees' wages and hours and that defendants violated §11(e) of the Act. I further

find that defendants must by the judgment of this Court be required to pay the sum of $14,350.85 representing amounts due past and present employees as hereinafter listed and that defendants are enjoined from violating the provisions of §§15(a)(2) and 15(a)(5) of the Act.

The names of the employees of defendants and the amounts attributable to each are as follows:

Walt Ritterbush	900.92
Steve Madden	71.77
Frank Schmermund	430.69
Alan Fortenberry	199.93
Jay Anderson	1148.30
Richard March	1257.38
Jim Sirago	1392.99
Paul Perkey	289.80
Dan Gustin	27.59
Sam Abrahamian	386.09
Don Ault	1300.12
John Aull	304.33
Jay Barbieri	447.09
Bruce Bassick	223.39
Louie Basile	810.87
Carl Beyer	36.83
Keri Crandell	224.18
Jim Evans	1802.37
Steve Fabian	1053.43
Tom Fowler	69.76
Ray Johnson	471.24
Greg Knee	48.59
Bill Lamb	104.92
Ron Lincks	239.28
Mike McElroy	594.45

Tom Roberts	330.41
Tom Vandercook	175.13
TOTAL	$ 14,350.85

Plaintiffs shall prepare proposed findings of fact and conclusions of law and a proposed form of judgment within 20 days.

DATED: This 20th day of October, 1975

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District Judge

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977
No. 77-439

HAROLD EKMANIAN, individually and B & H INGLEWOOD TOW, a corporation,

Petitioners,

vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Respondent.

SUPPLEMENTAL BRIEF ON PETITION FOR CERTIORARI

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Attorney for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

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IN THE
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HAROLD EKMANIAN, individually and B & H INGLEWOOD TOW, a corporation,

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vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Respondent.

SUPPLEMENTAL BRIEF ON PETITION FOR CERTIORARI

Pursuant to the pro visions of Rule 24(5), of Rules of the Supreme Court of the United States, Petitioner Harold Ekmanian, individually and B & H Inglewood Tow, a corporation, respectfully file this Supplemental Brief in support of their application to this Court for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed in this

matter on July 27, 1977.

1. Reason for Filing Supplemental Brief:

In its Memorandum for the Respondent in Opposition to the petition for writ of certiorari, the Respondent has misstated the facts and applied such misstated facts to non-applicable law to result in what is tantamount to a misstatement of law. Not to call this to the attention of the court by means of this supplemental brief - this being matter not available at the time of the filing of the petition - would be a failure of duty to the petitioner and this court.

2. Facts Misstated:

In paragraph 1, on page 2 of Respondent's Memorandum in Opposition it is stated:

> "They thereby keep the interstate roads clear of obstructions and facilitate the free passage of interstate travel. The activities of petitioners' employees in keeping the channels of interstate commerce clear of obstructions are 'so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it."' Overstreet v. North Shore Corp., 318 U.S. 125, 130." (Underscoring added.)

These statements are untrue. The petitioners here were not designated by the Department of Transportation or the Highway Patrol of the State of California to service any freeway or state highway, this designation in the Inglewood area being held exclusively by another company, Inglewood Service Garage, with whom Petitioners have no connection (R.T. p. 146, lines 8-16). Such other garage attends to any wrecks, blockages or traffic-impeding situation on the freeway that passes through Inglewood, and Petitioners are not authorized so to do.

Petitioner's only contact with freeways is that this small local garage did for a time (no longer) render service for local auto club members at $3.20 per call (garages towing cars from freeways get more than 5 times that sum per call) their cars being pulled over on the right shoulder, out of the traveled portion, through the use of a small pick-up truck, providing gas, battery jumping and changing tires. They do not handle wrecks on the freeway (R.T. p. 146, line 20 through line 12, p. 148).

Next, Respondent compared this small local garage, which is not designated to service freeways or state highways with the situation in the cases of Gray v. Swanney-McDonald, Inc., 436 F.2d 652, certiorari denied, 402 U.S. 995; Brennan v. Keyser, 507 F.2d 472, certiorari denied; Keyser v. Dunlop, 420 U.S. 1004; and Hodgson v. Baker, 544 F.2d 426, certiorari denied; Baker v. Marshall, 430 U.S. 946 with which there is no actual similarity. And on page 3 of Respondent's Memorandum it states:

> "Last spring the Court declined to review Baker, an almost identical case, and there is no greater reason to grant review of the present case." (Underscoring added.)

Again, this statement is an incorrect factual statement.

Aside from many other issues of law there presented, Baker was an official police garage and one designated by the Highway Patrol to service portions of the state highways and freeways passing through his San Fernando Valley area . . . in the city of Los Angeles. Petitioner, herein is not and has not been so designated or authorized to render such service on state highways and freeways.

Swanney-McDonald and Keyser were also official Los Angeles Police garages, designated by the Highway Patrol to service freeways and state highways passing through that portion of the City of Los Angeles that they were authorized to service. Ekmanian and B & H Tow, have never had such designation or authorization.

Counsel for petitioner herein was also counsel in each of the above mentioned cases for the garages involved, i.e., Swanney-McDonald, Keyser, and Baker. The situation and facts in the present case are entirely different and not comparable with such earlier cases.

In the earlier cases, while it was argued that their activities were local in character because their services were confined to internal

roadways (freeways) entirely within the City of Los Angeles, nevertheless, each of such garages in those cases were Official Police garages and designated by the Police Department and the Highway Patrol to remove wrecks, damaged and disabled vehicles from such internal freeways.

The petitioner here performs no such service, has never been designated or authorized as an Official garage by the Police, Highway Patrol, Department of Transportation or otherwise to render such service, and in the small area where he transacts his local business there is an Official garage designated by the Police Department and the Highway Patrol to - and is the only garage authorized to - render such service. Such comparison as undertaken by Respondent therefore is without basis in fact.

Petitioner has nothing to do with keeping channels of interstate commerce clear of obstructions!

Respectfully submitted,

G. G. BAUMEN

Attorney for Petitioner

Supreme Court, U. S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

No. 77-439

In the Supreme Court of the United States

OCTOBER TERM, 1977

HAROLD EKMANIAN and B & H INGLEWOOD TOW, A CORPORATION, PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
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In the Supreme Court of the United States

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HAROLD EKMANIAN and B & H INGLEWOOD TOW,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, does not apply to their towing operations because, they assert, the towing operations are local in character and thus not "in commerce" within the meaning of the Act.

The Secretary of Labor commenced this action to enforce the overtime and recordkeeping provisions of Sections 7 and 11 of the Act, 29 U.S.C. 207 and 211. Testimony before the district court indicated that petitioners' employees accepted calls to tow or repair vehicles on freeways carrying interstate traffic, and that each employee would respond to freeway calls approximately five times weekly (Pet. App. B-3). The

district court held that petitioners' employees were engaged in interstate commerce and that petitioners had violated the Act (Pet. App. B-5 to B-7). The court of appeals affirmed the determination of coverage, but it remanded for a recomputation of the amounts of back wages due to the employees (Pet. App. A).

1. Petitioner's trucks and crews regularly provide "assistance to and towing of disabled vehicles from freeways, highways, streets and roads" in Los Angeles (Pet. App. B-2). They thereby keep the interstate roads clear of obstructions and facilitate the free passage of interstate travel. The activities of petitioners' employees in keeping the channels of interstate commerce clear of obstructions are "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' " *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 130.

Following *Overstreet*, which held that the Act applies to employees of a company engaged in maintaining a drawbridge that, unless properly serviced, would obstruct interstate transportation, numerous lower courts have applied the Act to employees of towing and wrecker services, such as petitioners', that help "maintain the road free from obstruction." *Crook* v. *Bryant*, 265 F. 2d 541, 543 (C.A. 4); *Gray* v. *Swanney-McDonald, Inc.*, 436 F. 2d 652 (C.A. 9), certiorari denied, 402 U.S. 995; *Brennan* v. *Keyser*, 507 F. 2d 472 (C.A. 9), certiorari denied *sub nom. Keyser* v. *Dunlop*, 420 U.S. 1004; *Hodgson* v. *Baker*, 544 F. 2d 429 (C.A. 9), certiorari denied *sub nom. Baker* v. *Marshall*, 430 U.S. 946. No court of appeals has held that employees of towing companies are not covered by the Act.[1] There is no conflict among the circuits on this

[1]See also *Snelling* v. *O.K. Service Garage, Inc.*, 311 F. Supp. 842 (E.D. Ky.). For the reasons discussed in the text, the Act also has been held applicable to companies engaged in dredging navigable waters (*Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C.A. 9)); repairing, maintaining and lighting streets and runways at a military base (*Writz* v. *B. B. Saxon Co.*, 365 F. 2d 457, 460, 462 (C.A. 5); *Writz* v. *R. E. Lee Electric Co.*, 339 F. 2d 686 (C.A. 4)); and providing ambulance service for victims of accidents on interstate highways (*Duffy* v. *Oele*, 274 F. Supp. 307 (W.D. Mich.); *Wirtz* v. *A-1 Ambulance Service, Inc.*, 299 F. Supp. 197 (E.D. Ark.); *Kelly* v. *Ballard*, 298 F. Supp. 1301 (S.D. Cal.)).

issue. Last spring the Court declined to review *Baker*, an almost identical case, and there is no greater reason to grant review of the present case.[2]

Petitioners contend (Pet. 21-23) that the decision of the court of appeals is at odds with the Act and the decisions

[2]Petitioners rely (Pet. 20, 23-24) on *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, and (by implication) *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, for the proposition that the "commerce" requirement in the Act should be construed to avoid applying it to local enterprises. But *Gulf* and *American Building* involved the Robinson-Patman Act and the Clayton Act, statutes with meanings and histories quite distinct from that of the Fair Labor Standards Act. The Court distinguished the Fair Labor Standards Act in both cases (*Gulf, supra*, 419 U.S. at 196; *American Building, supra*, 422 U.S. at 277), pointing out that "we are concerned in this case with significantly different statutes." Neither case supports the view that commerce requirements usually should be construed to exclude businesses like petitioners'. See *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773. The Fair Labor Standards Act has been construed by this Court "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; *Overstreet* v. *North Shore Corp., supra*, 318 U.S. at 128. The acts of petitioners' employees are in interstate commerce, and the Fair Labor Standards Act therefore applies. Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 255 (local restauranteur serving travelers has an effect on interstate commerce).

These cases also answer petitioners' contention (Pet. 24) that the Tenth Amendment precludes application of the Act to the towing business. See *Gulf, supra*, 419 U.S. at 196-197; *Wickard* v. *Filburn*, 317 U.S. 111, 127-128.

of other courts because it focuses on the activities of the employer rather than the activities of the employees. This is incorrect. The court of appeals did not hold that the Act applies to the drivers because petitioners are engaged in commerce; it held, instead, that the drivers are engaged in commerce. Whether any of petitioners' employees other than their drivers would be covered by the Act is not presented by the present case.

2. It is not clear why petitioners complain (Pet. 25) that the district court's order does not expressly authorize them to credit themselves with the amounts they are required to pay as income tax withholdings and the like. It always has been clear that an employer may credit itself with such payments out of wages that are required by law to be paid to its employees. The Department of Labor uniformly accepts such payments by the employer as satisfaction of the obligation under a back pay order, and the Department will do so in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1977.

DOJ-1977-11